

JOHN S. CLUETT

IBLA 79-429

Decided January 16, 1981

Appeal from decision of the California State Office, Bureau of Land Management, rejecting color-of-title application. CA-5359.

Affirmed as modified.

1. Color or Claim of Title: Generally

A claim under the Color of Title Act, 43 U.S.C. § 1068 (1976), has not been held in peaceful adverse possession where it was initiated while the land was withdrawn or reserved for Federal purposes.

2. Color or Claim of Title: Generally--Color or Claim of Title:
Applications--Color or Claim of Title: Good Faith

Good faith under the Color of Title Act, 43 U.S.C. § 1068 (1976), requires that a claimant and his predecessors in interest honestly believe there was no defect in the title and the Department may consider whether such a belief was unreasonable in light of the facts actually known or available to claimant or a predecessor.

3. Color or Claim of Title: Generally--Color or Claim of Title:
Applications--Color or Claim of Title: Good Faith

Where a predecessor in interest to a color-of-title claimant lacked good faith in 1906 because he had reason to know that title to the land remained in the

United States, a 1904 withdrawal immediately foreclosed any subsequent color-of-title claim.

APPEARANCES: John S. Cluett, pro se.

OPINION BY ACTING ADMINISTRATIVE JUDGE HARRIS

John S. Cluett has appealed from a decision of the California State Office, Bureau of Land Management (BLM), dated April 12, 1979, rejecting his class 1 color-of-title application, CA 5359, filed pursuant to the Color of Title Act, 43 U.S.C. § 1068 (1976). 1/ The basis for the rejection was appellant's failure to establish that his claim was based on a document of conveyance which preceded withdrawal of the land.

The application was filed on August 31, 1978, for 40 acres of land described as SE 1/4 SE 1/4, sec. 21, T. 20 S., R. 3 E., Mount Diablo meridian, Monterey County, California. The list of conveyances filed by appellant with his application indicated his claim originated with a deed from Nes P. and Mary E. Swending to John A. Little dated September 1, 1906.

The record discloses that the subject land was temporarily withdrawn from settlement, entry, sale, or other disposal, except under the mineral laws, for the proposed Monterey Forest Reserve by order of the Secretary of the Interior dated February 15, 1904. The land was permanently withdrawn by Presidential proclamation on June 25, 1906, 34 Stat. 3218.

On September 27, 1978, BLM issued a decision rejecting appellant's application because it was based on a conveyance which occurred after the land was withdrawn. On October 23, 1978, Title Insurance and Trust, acting on behalf of appellant, filed a letter with BLM requesting reconsideration of the rejection decision because additional research had revealed that Nes Swending filed an application to purchase the subject land from the State of California on November 7, 1901; that the application was approved on June 24, 1902; that the State issued a certificate of purchase to Swending on July 22, 1902, prior to the withdrawal; and that Swending's purchase of the land was in good faith. By letter dated October 25, 1978, BLM indicated that it would consider additional evidence concerning the application and granted additional time in which to furnish such evidence.

1/ A class 1 color-of-title claim is described in 43 CFR 2540.0-5(b) as: "[O]ne which has been held in good faith and in peaceful adverse possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years."

On February 16, 1979, Title Insurance and Trust submitted copies of 12 documents which it claimed substantiated the issuance of the certificate of purchase to Mr. Swending. ^{2/} However, a copy of the certificate of purchase was not included. ^{3/} By decision dated April 12, 1979, BLM rejected appellant's application on the basis that the certificate of purchase was not a conveying document and, therefore, the first deed in the chain of title, the deed from the Swendings to Little, was subsequent to the withdrawal.

[1] In order to support a class 1 claim under the Color of Title Act a claimant must establish that the public land in question has been held in good faith and in peaceful adverse possession by the claimant, his ancestors, or grantors, under claim or color of title for more than 20 years. 43 CFR 2540.0-5(b). Clearly, a claim has not been held in peaceful, adverse possession where it was initiated while the land was withdrawn or reserved for Federal purposes. Roland and Marie Oswald, 35 IBLA 79 (1978); Margaret C. More, 5 IBLA 252 (1972). Accordingly, if appellant's color-of-title claim was initiated by the deed from Swendings to Little, which was subsequent to the withdrawal, appellant's application must be rejected. See Marie Lombardo, 37 IBLA 247 (1978).

^{2/} The documents show the following. An application to purchase State lands described as the SE 1/4 SE 1/4, sec. 21, T. 20 S., R. 3 E., Mount Diablo meridian was signed by Nes Swending on November 7, 1901, and filed with the State of California on November 26, 1901. On November 27, 1901, California applied for and selected the subject lands as an indemnity lieu selection. The selection was presented to the United States General Land Office on November 29, 1901, and accepted for filing on May 22, 1901. The application to purchase State lands was approved on June 24, 1902, and certificate of purchase No. 3830 was issued. By letter dated July 27, 1905, the Commissioner of the General Land Office informed the California State Register and Receiver that State school indemnity selection No. 13000 which encompassed the 40 acres in question was invalid because the bases used were unsurveyed. The letter further stated that no amendatory list furnishing a different base for the selection could be allowed because the land had been withdrawn on February 15, 1904. The Commissioner of the General Land Office canceled State indemnity selection No. 13000 on January 10, 1906. By letter dated September 16, 1910, one Charles Rosendale, Esq., presented certificate of purchase No. 3830 to the State Surveyor General and requested a patent for the subject lands. The certificate of purchase was returned to Rosendale by letter of September 27, 1910, indicating that selection No. 13000 had been canceled in January 1906 and that a copy of the cancellation had been sent to one J. D. Ackerman. In a power of attorney filed with his application Swending had designated Ackerman as his agent and attorney-in-fact to deal with the State concerning Swending's application to purchase State lands.

^{3/} The letter accompanying the copies of the documents stated that a copy of the certificate of purchase was not included because "the State Lands Division did not keep copies of its certificates at that time and the original was either lost or destroyed."

To establish a color-of-title claim appellant must show at a minimum that good faith color of title arose on behalf of a predecessor in interest prior to the withdrawal in 1904. A claim of color of title must be based on a document which purports on its face to convey the land applied for to the applicant or his predecessor. Mary C. Pemberton, 38 IBLA 118 (1978); Joe Stewart, 33 IBLA 225 (1977); Estate of James J. Lee, 26 IBLA 102 (1976). In this case the document in question--the certificate of purchase --is not part of the record. At best the record discloses that certificate of purchase No. 3830 was issued by the State of California to Nes Swending on July 28, 1902. See copy of letter dated July 16, 1915, from the State Surveyor General to the County Assessor, Salinas, California. However, we need not determine whether the certificate of purchase was sufficient to initiate the color-of-title claim in light of other evidence.

[2] This Board has held that good faith under the Color of Title Act requires that a claimant and his predecessors honestly believe there was no defect in the title and the Department may consider whether such a belief was unreasonable in light of the facts actually known or available to the claimant or his predecessors. Mary C. Pemberton, supra at 124. In this case the record fails to show that the land was held under color or claim of title in good faith. There is evidence that Nes Swending knew or had reason to know prior to the deed to Little in September 1906 that title to the subject land was in the United States. By letter dated July 27, 1905, the Commissioner of the General Land Office informed the Register and Receiver in San Francisco, California, that State selection No. 13000 for the subject lands was invalid because the base land was unsurveyed. He also stated that because of the withdrawal affecting the land no different base for the selection would be allowed. The Receiver informed one Victor H. Woods, the State Surveyor General, by letter of September 8, 1905, that the State selection was being held for cancellation. A subsequent letter dated January 16, 1906, from the Register to Mr. Woods stated that the Commissioner canceled the State selection on January 10, 1906. 4/ A letter dated September 27, 1910, from the Register of the State Land Office to Charles B. Rosendale, Esq., who had presented certificate of purchase No. 3830 to the State for patent on September 17, 1910, stated: "A copy of the letter of cancellation was forwarded to J. D. Ackerman, who had filed a power of attorney signed by Nes Swending, authorizing him [Ackerman] to receive from this office any documents pertaining to the aforesaid selection [No. 13000]." 5/

4/ In the upper left hand corner of the copy of this letter are the hand written initials "J D A" above the date stamped "Jan 18 1906." In the body of the letter to the left of the paragraph stating: "No. 13000, R. & R. No. 5849 for the SE 1/4 of SE 1/4 Sec. 21, T. 20 S., R. 3 E., M.D.M. in lieu of 40 acres in Sec. 16, T. 21 S. R. 45 E., M.D.M.," appear again the handwritten initials "J D A." Accompanying Nes Swending's application to purchase filed on November 26, 1901, was a power of attorney to John D. Ackerman of San Francisco.

5/ The nature of Rosendale's relationship to Swending, if any, is not revealed by the record.

[3] Appellant has not alleged that his predecessor in interest, Nes Swending, did not have reason to know that the State selection had been canceled and that title to the land remained in the United States. It is not unreasonable to conclude from the evidence that Swending had reason to know in early 1906 that the State selection for the land he was seeking had been canceled and that title to the land was in the United States. See Henshaw v. Ellmaker, 56 I.D. 241, 244 (1937). For that reason, Swending's claim to the land lacked the requisite good faith. Since appellant's predecessor in interest did not have good faith color of title, the temporary February 1904 withdrawal, which became permanent in June 1906, attached and foreclosed any subsequent color-of-title claim. The September 1906 deed from the Swendings to Little could not have initiated a color-of-title claim.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

Bruce R. Harris

Acting Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

